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MR. MADISON MEETS A TIME MACHINE: THE POLITICAL SCIENCE OF FEDERAL SENTENCING REFORM

Frank O. Bowman, III*

INTRODUCTION.....	235
I. THE CONSTITUTION AND THE BALANCE OF SENTENCING POWER	237
A. <i>The Spheres of Congressional and Judicial Power in Federal Sentencing</i>	237
B. <i>The Justice Department and Its Prosecutors</i>	243
II. THE STATE OF FEDERAL SENTENCING.....	243
A. <i>The Advent of the Guidelines</i>	243
B. <i>The Failure of the Guidelines</i>	246
C. <i>Prosecutorial Power Under the Guidelines</i>	247
D. <i>The Alliance of Congress and the Department of Justice</i>	250
E. <i>The Federal Budget and Federal Sentencing</i>	252
F. <i>The Sentencing Commission</i>	253
III. SOME PRESCRIPTIONS	256
A. <i>What To Do</i>	256
1. <i>Booker is not the answer</i>	256
2. <i>The virtues of simplicity</i>	258
B. <i>The Conditions Necessary for Success</i>	259
1. <i>Contributions from the Supreme Court</i>	259
2. <i>Contributions from the Sentencing Commission</i>	263
3. <i>Hopeful auguries of change in the country's mood</i>	264
CONCLUSION	264

INTRODUCTION

Careful analysis of the twenty-year-old federal experiment with structured

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sentencing suggests one overriding conclusion about the design of sentencing systems: a sentencing system that sensibly distributes power—both the power to make sentencing rules and the power to determine sentences in particular cases—among the institutional sentencing actors is likely to work pretty well. Conversely, a system that concentrates sentencing power disproportionately in the hands of one or even two institutional sentencing actors is headed for trouble. The federal sentencing experience of the past three decades is a case study in Madisonian political theory.¹ It demonstrates that a governmental system that fails to erect a properly conceived set of checks and balances against the inevitable tendency of political actors toward personal and institutional self-aggrandizement is prone to degenerate into a despotism of the most powerful branch or, as Madison particularly feared, into an alliance of two branches against the third.²

The current federal sentencing regime, with its Sentencing Commission and complex Guidelines, was intended to insulate the process of making sentencing rules from the passions of politics. But as we will see, the architects of the system miscalculated and created a sentencing structure almost perfectly designed for capture and manipulation by the political branches. The existence of this structure in combination with a variety of other factors has produced a time machine. Not an H.G. Wells time machine that travels in the fourth dimension,³ but a machine whose only product is incarcerative time, a machine controlled by a so-far indissoluble alliance between Congress and the Justice Department.

In previous articles⁴ I have analyzed the structural failures of the Federal Sentencing Guidelines system, particularly the imbalances it has created among the primary institutional sentencing actors—Congress, the judiciary, the Justice Department, and the U.S. Sentencing Commission—and have proposed a

1. I refer to the general theory of separation of powers between executive, legislative, and judicial branches of government championed by Montesquieu (among many others) and refined by James Madison and other founders of the American Constitution into a system of governmental checks and balances. See CHARLES DE SECONDAT DE MONTESQUIEU, *THE SPIRIT OF LAWS* 171 (Thomas Nugent trans., Batoche Books 2001) (1748); see also *THE FEDERALIST* NO. 48 (James Madison).

2. See generally *THE FEDERALIST* NO. 49 (James Madison) (“If the legislative authority, which possesses so many means of operating on the motives of the other departments, should be able to gain to its interest either of the others,” the third department “could derive no advantage.”). Madison discusses the prospect of an alliance of two branches against the third in the particular context of Thomas Jefferson’s proposal in “Notes on the State of Virginia” that a new constitutional convention be called whenever two of the three branches call for it. However, Madison’s concern about an alliance of two branches is more general and emerges throughout his discussion of the constitutional system of checks and balances.

3. H.G. WELLS, *THE TIME MACHINE* (1898).

4. See, e.g., Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005) [hereinafter Bowman, *Failure of the Federal Sentencing Guidelines*].

simplified guidelines system designed to address the current system's structural flaws⁵ and to be consistent with the Supreme Court's developing Sixth Amendment jury trial jurisprudence.⁶ However, neither a failure analysis nor the prescription for a revised system is of much practical value unless these institutions can interact in ways that will permit reform to occur. Consequently, this Article considers the politics and political science of federal sentencing reform.⁷ More particularly, it asks whether the twenty-first-century custodians of Madison's eighteenth century model of government can use that model's tools to disassemble the federal time machine and erect in its place a more balanced and beneficent sentencing system.

The Article proceeds in three Parts. First, it sketches the constitutional relationship between Congress, the judiciary, and the Department of Justice in the field of criminal sentencing. Second, it describes the current state of federal sentencing in terms of the relations between the primary institutional players, with particular attention to the Supreme Court's decision in *United States v. Booker* declaring the Federal Sentencing Guidelines unconstitutional as then applied. Finally, it analyzes the prospects for significant positive change in the near term and suggests a set of preconditions for improving those prospects.

I. THE CONSTITUTION AND THE BALANCE OF SENTENCING POWER

A. *The Spheres of Congressional and Judicial Power in Federal Sentencing*

The institutional actors in federal sentencing have at various times included Congress, the judiciary, the Justice Department, the defense bar, the United States Parole Commission, and the United States Sentencing Commission.

5. Frank O. Bowman, III, *Beyond BandAids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. (forthcoming 2005) [hereinafter Bowman, *Beyond BandAids*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=721563 (last visited Sept. 16, 2005).

6. The Supreme Court is in the midst of developing new Sixth Amendment doctrine for the sentencing process. See *United States v. Booker*, 125 S. Ct. 738 (2005) (finding the Federal Sentencing Guidelines unconstitutional as applied and invalidating sections of the Sentencing Reform Act of 1984 to make the Sentencing Guidelines "effectively advisory"); *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (striking down the Washington state sentencing guidelines system as violative of the Sixth Amendment right to trial by jury); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). For a critique of the *Blakely* decision, see Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217 (2004).

7. See Frank O. Bowman, III, *Murder, Meth, Mammon, and Moral Values: The Political Landscape of American Sentencing Reform*, 44 WASHBURN L.J. 495 (2005) [hereinafter Bowman, *Murder, Meth, Mammon, and Moral Values*] (surveying the political posture of sentencing reform in America generally).

Only the first four have a constitutionally mandated permanent place in the political calculus of sentencing,⁸ and of the four permanent sentencing players, only Congress and the federal judiciary have traditionally played a direct role in making, interpreting, and implementing sentencing rules. For that reason, and because tension between Congress and the federal judiciary is so obvious a part of the current federal sentencing landscape,⁹ I begin by considering the spheres

8. I count the Justice Department as having constitutional status only because it is the organizational representative of the President whose constitutional duties include that "he shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

I also include the defense bar in this group, but doing so is something of a stretch. While defendants have a constitutional right to counsel in criminal prosecutions and are customarily represented by lawyers at sentencing, the "defense bar" embraces a universe of organizations and individual practitioners with virtually no consistent institutional presence in the sentencing process and no direct say in sentencing rulemaking.

One might categorize the jury as a separate constitutionally mandated institutional federal sentencing actor. After all, in a case tried to a jury, its decisions either determine (in capital cases) or influence (in noncapital cases) the sentence the defendant will receive. Moreover, the Supreme Court's recent Sixth Amendment jury trial decisions from *Apprendi* to *Booker* suggest that juries should play a more prominent role in finding facts determinative of sentencing. Nonetheless, this Article does not treat the jury as a significant institutional actor in the current federal sentencing debate. First, more than 95% of all federal cases are resolved by plea. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 26 tbl.11 (2005) [hereinafter U.S. SENTENCING COMM'N, 2003 SOURCEBOOK] (showing 95.7% of all sentenced federal defendants pled guilty). Hence, juries are not involved in very many federal cases. See generally Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001). Second, juries are not repeat players in the criminal system. "The jury" in the abstract may be involved in multiple cases, but each jury is an ad hoc assembly gathered for one case and permanently disbanded at its conclusion. Third, except in capital cases, federal jurors do not themselves impose or even recommend sentences; they find facts that may have a bearing on sentencing, but are denied any information about the sentencing consequences of their choices. See *Shannon v. United States*, 512 U.S. 573, 579 (1994) (finding that where a jury has no sentencing role, providing sentencing information "invites [jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion"). They also may be instructed by the judge not to take sentencing into account in reaching their verdicts. See *United States v. McDonald*, 620 F.2d 559, 565 (5th Cir. 1980) (approving instruction that the question of punishment "should never be considered by the jury in any way" in deciding the case). Finally, juries are wholly uninvolved in the rulemaking stage of the sentencing process, which is the focus of this Article.

9. The most notable recent example of this tension is the passage of the Feeney Amendment to the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat 650 (codified as amended in scattered sections of U.S.C.). The Feeney Amendment, named after its sponsor, Rep. Tom Feeney, markedly diminished judicial discretion in Guidelines sentencing and amended the enabling legislation of the Sentencing Commission by striking the requirement that at least three commissioners must be sitting federal judges and substituting a provision mandating that no more than three judges may be commissioners. For discussion of the Feeney Amendment from the perspective of the defense bar and some federal judges, see Mark H. Allenbaugh, *Fighting the Feeney Fear Factor: The Federal Courts Strike Back*, CHAMPION, Jan.-Feb. 2004, at 46. See also David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211 *passim*

of congressional and judicial power in federal sentencing.

First, legislatures in modern American practice have virtually plenary power to define crimes.¹⁰ The ancient common law power of judges to define new crimes through adjudication survives, if it does at all, only as a vestigial practice in a tiny number of states, and then only as to misdemeanors and petty offenses.¹¹

Second, at present, legislatures also have virtually plenary power to set the punishments attendant upon conviction of a crime.¹² The only constitutional limitation on the type or severity of punishment a legislature may assign to conviction of a crime is the Cruel and Unusual Punishments Clause of the Eighth Amendment.¹³ The Supreme Court's Eighth Amendment jurisprudence has produced a lush thicket of substantive and procedural constraints on the imposition of the death penalty,¹⁴ but its recent cases have imposed scarcely any meaningful limitation on the imposition of incarcerative punishments.¹⁵

(2004). For Congressman Feeney's view of his own amendment, see Tom Feeney, Letter to the Editor, *Justice Should Be the Same for All*, NAT'L J., Feb. 14, 2003.

10. *Montana v. Egelhoff*, 518 U.S. 37, 58 (1996) ("States enjoy wide latitude in defining the elements of criminal offenses When a State's power to define criminal conduct is challenged under the Due Process Clause, we inquire only whether the law 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)) (Ginsburg, J., concurring)). There is debate over whether legislatures can treat certain kinds of facts, such as those affecting the existence or type of mens rea, as affirmative defenses or withdraw them from the jury's consideration altogether. See, e.g., *Egelhoff*, 518 U.S. at 58 (discussing whether the Montana legislature could bar the admission of evidence of intoxication on the question of whether a defendant possessed the requisite mental state for a crime); *Patterson*, 432 U.S. at 197 (discussing whether the Due Process Clause prohibits "burdening the defendant in a New York State murder trial with proving the affirmative defense of extreme emotional disturbance as defined by New York law"). But these are boundary issues that affect the core of legislative definitional power scarcely at all.

11. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 195 (1985) ("Judicial crime creation [in the United States] is a thing of the past.").

12. At the federal level, the power of Congress to define and punish crime is subject to some modest jurisdictional limitations. The Constitution provides direct textual authorization to Congress to define and set punishments only for crimes involving the securities and coinage of the United States, piracies and felonies committed on the high seas, offenses against the law of nations, and matters occurring in the District of Columbia. U.S. CONST. art. I, § 8. All other federal criminal legislation—which is to say virtually the entire federal criminal code—is constitutionally justifiable largely as an exercise of congressional power under the Commerce Clause.

13. U.S. CONST. amend. VIII.

14. See *Furman v. Georgia*, 408 U.S. 238 (1972), and the myriad cases it spawned addressing the constitutional limitations on imposition of the death penalty.

15. See, e.g., *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding two consecutive sentences of twenty-five years to life for a repeat offender who stole \$150 in videotapes); *Ewing v. California*, 538 U.S. 11 (2003) (finding no constitutional error in a sentence of twenty-five years to life for a repeat offender who stole three golf clubs valued at \$1200). For an analysis of the Supreme Court's Eighth Amendment Cruel and Unusual Punishments

Third, when we speak of the legislative power to define a crime, we mean that the legislature's specification of a set of facts which must be proven for criminal liability to attach and its specification of the punishment attendant upon proof of that set of facts are inextricably linked components of the single legislative act of crime definition. This is the central insight of the Supreme Court's Sixth Amendment jury trial jurisprudence in *Apprendi v. New Jersey*,¹⁶ *Blakely v. Washington*,¹⁷ and *United States v. Booker*.¹⁸ These cases say, in effect, that a "crime" consists of a designated list of facts that trigger eligibility for a designated range or quantum of punishment. If proof of a fact affects the range or quantum of punishment (at least in certain ways) then that fact becomes part of the definition of a "crime," and thus subject to the full panoply of procedural protections associated in the Bill of Rights with criminal trials.¹⁹

Fourth, while Congress can neither adjudicate individual civil or criminal cases (except those involving impeachment²⁰) nor impose criminal sentences on individual defendants,²¹ it can establish rules of evidence²² and procedure²³ governing the adjudication of guilt and the imposition of punishments by the courts. In the Sentencing Reform Act of 1984,²⁴ Congress delegated the task of drafting sentencing rules to the U.S Sentencing Commission, but provided that the rules could not go into effect until Congress approved them.²⁵ Moreover, Congress reserved to itself the power to disapprove of subsequent Guidelines amendments promulgated by the Commission,²⁶ to recommend or direct that

jurisprudence, see generally Thomas G. Stacy, *Cleaning Up the Eighth Amendment Mess* (2005) (unpublished manuscript, http://papers.ssrn.com/paper.taf?abstract_id=703103 (last visited Sept. 16, 2005)).

16. 530 U.S. 466 (2000).

17. 124 S. Ct. 2531 (2004).

18. 125 S. Ct. 738 (2005).

19. At present, this holding is limited to facts that trigger increases in the maximum sentence to which a defendant might be exposed upon conviction. As discussed in greater detail below, *infra* notes 35 & 103 and accompanying text, the Court now permits judges to determine facts that generate minimum sentences so long as such sentences are lower than the legislatively designated maximum. See *Harris v. United States*, 536 U.S. 545 (2002); *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).

20. U.S. CONST. art. I, §§ 2-3.

21. U.S. CONST. art. III, § 1.

22. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE*, 5-6 (2d ed. 1999) (summarizing legislative history of the Federal Rules of Evidence).

23. The Federal Rules of Criminal Procedure were first adopted by the Supreme Court in response to congressional legislation. U.S. Supreme Court Order of Dec. 26, 1944 ("prescribing" rules of criminal procedure).

24. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (codified as amended in scattered sections of 18 and 28 U.S.C.).

25. *Id.*

26. 28 U.S.C. § 994(p) (2005) (providing that Guidelines amendments properly promulgated by the Sentencing Commission and submitted to Congress will go into effect 180 days after submission unless "modified or disapproved by Act of Congress").

the Commission enact amendments,²⁷ and to amend the Guidelines directly by statute.²⁸

Fifth, the Supreme Court has consistently held that Congress can make sentencing rules itself or delegate their making to a sentencing commission.²⁹ When the Court finally found the Guidelines unconstitutional in *United States v. Booker*, it did so based not on their substance, but on a question of procedure—the identity of the sentencing fact-finder.³⁰ Nothing in *Booker* suggests any limitation on congressional power to legislate exactly the same sentences called for by the Guidelines based on exactly the same facts.³¹ The only meaningful constitutional constraints on congressional sentencing authority are procedural limits imposed by the Sixth Amendment jury trial clause and the largely latent Due Process Clauses. At present, the Sixth Amendment requires that a jury decide any fact other than one relating to criminal history³² which, if proven, would increase a defendant's maximum sentencing exposure.³³ However, in *Harris v. United States*, the Court held that judges could find facts generating mandatory minimum sentences.³⁴ And the *Booker* remedial majority strongly suggests that facts which increase a maximum presumptive sentence can be found by judges, so long as judges retain some as-yet-undefined degree of discretion to impose sentences greater

27. See, e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 805, 905, 1104, 116 Stat. 765 (2002) (containing general and specific directives to the Sentencing Commission regarding amendments to guidelines relating to economic crimes).

28. Congress exercised the power to directly amend the Sentencing Guidelines for the first time in the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of U.S.C.). See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b) (2004) (Trafficking in Material Relating to Exploitation of a Minor), *amended by* PROTECT Act § 401(i)(1)(C); U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (Acceptance of Responsibility), *amended by* PROTECT Act § 401(g); U.S. SENTENCING GUIDELINES MANUAL § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), *amended by* PROTECT Act § 401(i)(1)(A); U.S. SENTENCING GUIDELINES MANUAL ch. 5, various sections (relating to grounds for departure), *amended by* PROTECT Act § 401(b)(1)-(5).

29. See, e.g., *United States v. Booker*, 125 S. Ct. 738, 775 (2005); *Mistretta v. United States*, 488 U.S. 361, 380-84, 387 (1989).

30. *Booker*, 125 S. Ct. at 756 (Stevens, J.).

31. Indeed, Justice Stevens in his *Booker* dissent was at pains to point out that Congress could reenact the exact same guidelines system the Court was declaring unconstitutional so long as the mechanism for finding sentencing facts complied with the Sixth Amendment. *Booker*, 125 S. Ct. at 778 (Stevens, J., dissenting). Justice Breyer's remedial majority opinion quibbles with Justice Stevens's phrasing, but does not deny the essential point. *Id.* at 759 (Breyer, J.).

32. See *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (holding that treating recidivism as a sentencing factor to be decided by a judge, rather than as an element of a crime to be decided by a jury, does not violate the Constitution).

33. *Booker*, 125 S. Ct. at 759; *Blakely v. Washington*, 124 S. Ct. 2531, 2536 (2004).

34. 536 U.S. 545 (2002).

than that presumptive maximum.³⁵ The Court could elect to impose more significant due process constraints on sentencing proceedings before judges, but it has so far been reluctant to do so.³⁶

Sixth, while a good many people intuitively feel that the determination of individually tailored sentences for criminal defendants is an integral part of the judicial function,³⁷ that view has, at present, no constitutional foundation. After all, the Constitution requires only one Supreme Court, leaving the creation of lower federal courts to the discretion of Congress.³⁸ The Judiciary Act of 1789, which commentators often accord quasi-constitutional status, granted lower federal courts jurisdiction over certain criminal matters, but that grant included no reference to judicial sentencing authority.³⁹ Over the years, the Supreme Court has held that Congress can constitutionally create a sentencing scheme that gives virtually unlimited sentencing discretion to judges⁴⁰ or, as in the cases of single-penalty sentencing schemes and mandatory minimum sentences, virtually no discretion at all.⁴¹

The confluence of the foregoing points means that Congress can define virtually any objectionable conduct as a crime and impose virtually any punishment it chooses for that conduct and that the federal courts presently possess virtually no direct constitutional control over Congress's power to do so. The power courts possess is over sentencing procedure; yet in *Apprendi*, *Blakely*, and *Booker*, the Court has taken only very modest steps toward imposing meaningful procedural constraints on the imposition of noncapital punishments.⁴² Even if the Court were to impose further procedural requirements—for example, by overturning *Harris* and requiring jury findings of facts generating mandatory minimum sentences or by imposing greater due

35. For a more detailed analysis of this point, see Frank O. Bowman, III, *Beyond BandAids*, *supra* note 5, at 30-32 & nn.202-206.

36. See generally Frank O. Bowman, III, *Completing the Sentencing Revolution: Reconsidering Sentencing Procedure in the Guidelines Era*, 12 FED. SENT'G REP. 187 (2000) [hereinafter Bowman, *Completing the Sentencing Revolution*].

37. See, e.g., KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 6-7, 78-79 (1998). For a critique of this view, see Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 310-26 (2000) [hereinafter Bowman, *Fear of Law*].

38. U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

39. Judiciary Act of 1789, ch. 20, §§ 9, 29, 33, 1 Stat. 73 (1789).

40. *Williams v. New York*, 337 U.S. 241, 248 (1949) (referring to "[t]oday's philosophy of individualizing sentences"); *Burns v. United States*, 287 U.S. 216, 220 (1932) ("It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.").

41. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 994-96 (1991); *supra* note 15 and accompanying text.

42. See Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082 (2005).

process protections on judicial sentencing proceedings—such requirements would burden federal trial judges and complicate the lives of federal prosecutors. However, these procedural constraints would limit congressional sentencing authority only indirectly and only to the extent that Congress proved unwilling to impose additional burdens on judges and prosecutors by enacting sentencing rules that triggered additional procedural protections. As ineffectual as such an exertion of judicial authority might seem, I will argue in the following Parts that further action by the Court overturning *Harris* and also “constitutionalizing” some degree of judicial sentencing discretion is an essential component of any solution to the present federal sentencing problem.

B. The Justice Department and Its Prosecutors

First formed in 1870, the Justice Department is a relative historical newcomer⁴³ and has no constitutional authority over sentencing. For many years in the pre-Guidelines era, a component of the Justice Department, the United States Parole Commission, effectively shared sentencing power with the judiciary by virtue of the Commission’s parole release authority.⁴⁴ However, that authority disappeared in 1987 with the Sentencing Reform Act’s abolition of parole.⁴⁵ Of course, the Justice Department and its prosecutors have always played an important advocacy role in making and enforcing sentencing rules, but the Department has no constitutional power (and, until recently, had no statutory authority) to make rules directly governing the judicial imposition of sentences. As we will see, perhaps the greatest change wrought by the Sentencing Reform Act of 1984 and the advent of the Guidelines era has been a fundamental transformation of the role of federal prosecutors in sentencing.

II. THE STATE OF FEDERAL SENTENCING

A. The Advent of the Guidelines

A focus on the power relationships between institutional sentencing actors explains a great deal of federal sentencing policy over the last few decades. The principal critique of the pre-Guidelines federal sentencing system was that it concentrated too much power in the hands of individual sentencing judges,

43. The office of Attorney General of the United States was created by the Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93 (1789), but the Justice Department was not created until 1870, Act To Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).

44. 18 U.S.C. §§ 4201-4218 (repealed 1984) (setting out powers of United States Parole Commission). For a general study of federal parole decisionmaking, see DON M. GOTTFREDSON, LESLIE T. WILKINS & PETER B. HOFFMAN, *GUIDELINES FOR PAROLE AND SENTENCING* (1978).

45. William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *Competing Sentencing Policies in a “War on Drugs” Era*, 28 WAKE FOREST L. REV. 305, 306 (1993).

power that was unconstrained either by a priori legislative rules or even by post hoc appellate review.⁴⁶ This critique was somewhat overstated inasmuch as it ignored the counter-balancing effect of back-end release authority of parole boards.⁴⁷ But it is nonetheless true that the old system did not give Congress, prosecutors, appellate courts, or defendants any meaningful power either to set or to dispute sentences.

The Sentencing Reform Act of 1984⁴⁸ was designed to remedy the old system's institutional imbalance. On paper, the Act distributed sentencing authority in an extraordinarily sensible way. It created the Sentencing Commission,⁴⁹ which was to serve as an expert neutral rulemaker, reasonably insulated from direct political pressure, and also to serve as a forum for policy debate among the other institutional actors. Congress retained ultimate authority over the Commission's rules⁵⁰ but would in theory stay out of the details of sentencing policy, or at least would give substantial deference to the Commission's conclusions.

The Justice Department was granted a nonvoting ex officio seat on the Sentencing Commission, but was intended to be only one among many voices in sentencing rulemaking.⁵¹ Nonetheless, the Guidelines promulgated by the Commission granted prosecutors an unprecedented measure of authority over particular sentences because the pre-*Booker* Guidelines were mandatory and fact-driven, and prosecutors are largely in control of sentencing facts.⁵² Even at the individual case level, the relevant conduct rules were designed to ensure that prosecutors did not manipulate their control of the facts into absolute control over sentencing outcomes.⁵³

46. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973) (observing that "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law"). For a summary of the critiques of federal sentencing prior to the Sentencing Reform Act of 1984, see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning To Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680-89 [hereinafter Bowman, *Quality of Mercy*].

47. Bowman, *Quality of Mercy*, *supra* note 46, at 681-82.

48. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (codified as amended in scattered sections of 18 and 28 U.S.C.).

49. 28 U.S.C. § 991(a) (2005).

50. See *infra* notes 73 and 91 and accompanying text (discussing congressional authority over sentencing rules generally and over the Guidelines in particular).

51. 28 U.S.C. § 991(a) (making the Attorney General or his designee an ex officio member of the Sentencing Commission).

52. Prosecutors control sentencing facts in the sense that they customarily possess both knowledge of the evidence available to prove facts relevant to sentencing and some degree of discretion about whether to present such evidence to the court. See Bowman, *Fear of Law*, *supra* note 37, at 341-47; Bowman, *Quality of Mercy*, *supra* note 46, at 724-30; Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 512-25 (2002).

53. For discussion of the effect of the relevant conduct rules, see Bowman, *Quality of*

Trial judges lost their former plenary authority over front-end sentencing, but retained substantial theoretical sentencing discretion through the unconstrained power to sentence within ranges,⁵⁴ through the departure power to impose sentences outside of ranges,⁵⁵ and through the hidden but very real de facto discretionary authority that they were given through the power to find sentencing facts.⁵⁶ Appellate judges gained an unprecedented role in sentencing through the review function.⁵⁷ The Sentencing Reform Act affected other institutional players as well—changing the role of probation officers from quasi social workers to special masters of Guidelines fact-finding⁵⁸ and abolishing the parole board altogether.⁵⁹

Had this system worked as envisioned, it would have produced an admirable distribution of sentencing authority. As envisioned, Congress would set the upper and lower limits of punishment for general categories of crimes, while continuing to act as a democratic check on the judgments of the specialist Sentencing Commission about how to guide judicial discretion within the legislatively created range. Judges would have the benefit of sentencing guidance combined with ample, if not unlimited, power to fashion an appropriate sentence within, or occasionally outside of, a range specified in the Guidelines. For the first time, prosecutors would have a meaningful say in sentencing through their mastery of the facts and would gain a useful investigative tool in the substantial assistance motion.⁶⁰ Nonetheless, the absence of direct executive branch control over sentencing rules combined with the Guidelines' relevant conduct provision that ostensibly limited prosecutorial ability to manipulate individual sentences would prevent prosecutors from

Mercy, *supra* note 46, at 702-03; William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

54. U.S. SENTENCING GUIDELINES MANUAL § 5C1.1(a) (2004) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").

55. U.S. SENTENCING GUIDELINES MANUAL § 5K (2005) (detailing the approved grounds for upward or downward departures).

56. See Bowman, *Fear of Law*, *supra* note 37, at 338.

57. Compare *Koon v. United States*, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal."), with 18 U.S.C. § 3742 (2005) (creating a right of appeal of a Guidelines sentence in both the defendant and the government).

58. See Bowman, *Completing the Sentencing Revolution*, *supra* note 36, at 190-91 (discussing role of probation officers in Guidelines sentencing).

59. Wilkins & Steer, *supra* note 53, at 306.

60. A "substantial assistance motion" is a request by the government that the defendant be given a sentence below the otherwise applicable Guidelines range, U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005), or mandatory minimum sentence, 18 U.S.C. § 3553(e) (2005), based on the defendant's cooperation with the government in the investigation or prosecution of others. For discussion of such motions, see Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7 (1999).

dominating the system. Defendants would know the facts that mattered to their sentences and would have an opportunity to litigate them. And the Sentencing Commission would treat the sentencing behavior of judges, prosecutors, and defense counsel as a critical form of feedback upon which sensible amendments to the system could be based.

B. The Failure of the Guidelines

Despite its hopeful beginnings, the federal sentencing system as constituted before *Booker* failed. The system has suffered two principal substantive failures. First, the federal sentencing rulemaking power has become a one-way upward ratchet in which the sentences nominally required by the Guidelines are raised easily and often and lowered only rarely and with the greatest difficulty. Second, both judges and prosecutors have increasingly treated structured-sentencing rules primarily as tools for inducing guilty pleas and cooperation with the government. The consequence of these two failures operating in tandem has been unjustifiably long sentences imposed in some significant if unquantifiable fraction of federal cases, together with a steadily decreasing connection between the sentences the Guidelines ostensibly require and those actually imposed, as front-line sentencing actors evade the rules either to achieve what they perceive to be justice in individual cases or simply to further investigations or manage caseloads.

The substantive failures of the guidelines system occurred because the institutional balance that the Sentencing Reform Act was supposed to create broke down. The power that was concentrated unduly in the hands of trial judges and parole boards before the introduction of the Guidelines has migrated to an equally unbalanced concentration of power in the hands of prosecutors at the case level and an alliance between the Justice Department and Congress at the policy level. Three factors have been crucial in producing this state of affairs: the complexity of the federal sentencing system centered on the Guidelines, the rigidity of that system, and money.

The federal sentencing system is the most complex ever devised. To some extent, the system's complexity is unsurprising. The federal criminal code is a vast, undisciplined sprawl which features hundreds of substantive offenses carrying a patchwork array of penalties ranging from fines and probation to steeply punitive mandatory minimum sentences. The Sentencing Reform Act did nothing to simplify the code and instead commanded the first Sentencing Commission to create a guidelines system that would be overlaid on the code as it stood. The Commission's task was rather like that of an architect hired to design a mansion on a wildly irregular plot of land with the proviso that the building must be erected with no grading of the lot or preparation of the foundation. The Commission's task was further complicated by the Act's so-called "twenty-five-percent rule," a provision designed to tightly cabin judicial discretion by requiring that the Guidelines ranges created by the Commission

be fairly narrow.⁶¹ The product of the Commission's work was a system consisting of a 258-box sentencing grid⁶² with accompanying instructions sitting on top of a statutory structure that in some cases, such as those involving mandatory minimum sentences, trumped the Commission's Guidelines. The complexity of this system, in combination with its mandatory nature, has proved to be its undoing.

C. Prosecutorial Power Under the Guidelines

Before the Federal Sentencing Guidelines, the role of the federal prosecutor in both sentencing rulemaking and the imposition of sentences was almost exclusively that of an advocate, rather than a primary decisionmaker. The Guidelines fundamentally altered the prosecutorial role both in court and in rulemaking. The change is most obvious in court. Before the Guidelines, prosecutors could exercise some direct control over a defendant's sentence through their charging and plea bargaining functions. Nonetheless, the result of a conviction by either trial or plea was a broad statutory sentencing range within which the judge had virtually unlimited sentencing authority. At the sentencing hearing, a prosecutor could advocate a particular sentence, but had no effective means of imposing his or her preferences on the court. At sentencing hearings under the Guidelines, prosecutors are still advocates who address arguments to a judge. But the nature of the advocacy has changed from the pre-Guidelines role largely limited to allocution to one focused first on proving facts that trigger rules which limit the judge's discretion and only secondarily on allocution regarding the preferred sentence within the range dictated by the fact-based Guidelines.

Equally importantly, the Guidelines system has markedly enhanced the power of prosecutors to influence the range of available sentencing options before the sentencing hearing ever begins. Under the system that has evolved since the Guidelines became effective in 1987, prosecutors have the option to charge multiple offenses involving the same conduct but carrying different penalties;⁶³ to charge or not to charge a variety of mandatory sentencing provisions based on factors such as drug quantity, weapon possession,⁶⁴ or

61. The "twenty-five-percent rule" effectively imposed a mathematical requirement that a sentencing grid contain at least eighteen vertical offense levels. See Bowman, *Failure of the Federal Sentencing Guidelines*, *supra* note 4, at 1334. The creation of a horizontal criminal history axis of the sentencing table containing six boxes necessitated a table with no fewer than 108 boxes. A series of decisions by the original Commission produced a sentencing table even more complex than required. *Id.* at 1324-34.

62. U.S. SENTENCING GUIDELINES MANUAL § 5A (2004).

63. For example, a defendant in a fraud case involving more than one defendant can be charged based on the same conduct with either wire fraud, 18 U.S.C. § 1343 (2005), which now carries a maximum penalty of thirty years, or conspiracy to commit wire fraud, 18 U.S.C. § 371 (2005), the maximum penalty for which is only five years.

64. See, e.g., 18 U.S.C. § 924(c) (2005) (imposing minimum mandatory penalties for

second-offender status;⁶⁵ and (despite the nominal constraint imposed by the relevant conduct rules) to prove or abstain from proving an ever-growing list of aggravating or mitigating factors specified in the Guidelines themselves.⁶⁶ The more fact-based decision points that exist between case intake and sentence imposition, the greater direct control prosecutors will exercise over sentencing outcomes. The fewer such decision points, the less direct control prosecutors exercise. The combination of complex Guidelines overlaid on a system of statutory minimum mandatories and fact-based enhancements has turned prosecutors into primary decisionmakers whose choices can, to a far greater extent than was ever before possible, unilaterally constrain the judge's discretion.

At the rulemaking level, the pre-Guidelines Justice Department had no direct control over rules governing front-end judicial sentencing. Sentencing rules were made by Congress. The Justice Department was a respected voice in congressional deliberations, but it had no institutional presence in Congress and could neither make nor change sentencing rules itself. The Guidelines and associated legislation changed that situation.

First, by giving the Justice Department a seat on the Sentencing Commission, even a nonvoting ex officio seat, the Sentencing Reform Act gave the Department an institutional presence in all public and private Commission meetings and deliberations, something that was not and could not be true of the relation of any executive branch agency to Congress.⁶⁷

Second, application of the complex Sentencing Guidelines and associated statutes necessarily depends on a multitude of discretionary choices by individual federal prosecutors and their offices. The multiplication of such choices invites the inevitable bureaucratic response of departmental policies and regulations governing the behavior of individual prosecutors in the field. In order to preserve prosecutorial discretion, the Justice Department has avoided promulgating detailed national regulations governing prosecutorial charging and bargaining decisions. However, Attorneys General have issued orders both expanding and contracting the degree of autonomy enjoyed by United States

possession of firearms in connection with designated criminal offenses).

65. See, e.g., 21 U.S.C. § 851(b) (2005) (granting United States Attorneys authority to file an information triggering the applicability of enhanced penalties for drug defendants with prior convictions).

66. See Frank O. Bowman, III, *Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 387-89, 402-11, 415-19, 426-35 (2004).

67. While the Act guaranteed the Justice Department access to and a voice in both the public and private (essentially legislative) deliberations of the Sentencing Commission, Congress would never guarantee representatives of the executive branch similar entrée into its own legislative deliberations. Indeed, any such guarantee might violate the constitutional separation of powers.

Attorneys and their assistants.⁶⁸ More importantly, at the district level, United States Attorney's Offices adopt local declination and plea bargaining policies that act as binding sentencing rules within that jurisdiction.

Finally, the trend of recent sentencing legislation has been toward granting the Justice Department direct authority over sentencing outcomes. Until very recently, this authority took the form of statutes or guidelines requiring a government motion before a judge could grant certain downward sentencing adjustments.⁶⁹ But in the PROTECT Act of 2003, Congress took the remarkable step of giving the Attorney General direct regulatory authority to create "early disposition programs" in selected districts with high caseloads.⁷⁰ Such programs permit extraordinary sentence discounts for early pleas. Districts to which the Attorney General grants authority may have early disposition programs; districts to which the authorization is refused may not. The effect of the PROTECT Act is to grant the Attorney General the power to change federal sentencing law on a regional basis by regulation.

Thus, the Justice Department is a mere advocate no longer. It is instead an important, and perhaps preeminent, primary sentencing decisionmaker in individual cases and has been accruing an increasing degree of both direct authority and indirect influence over sentencing rules.⁷¹

68. The ebb and flow of central control over federal prosecutors' charging and plea bargaining authority can be seen by comparing a succession of memoranda and policy statements issued by Attorneys General Richard Thornburgh, Janet Reno, and John Ashcroft. See Memorandum from Richard Thornburgh, Attorney General, to Federal Prosecutors (Mar. 13, 1989), *reprinted in* 1 FED. SENT'G REP. 421 (1989) ("The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons. . . . The Department's policy is only to stipulate to facts that accurately represent the defendant's conduct."); Memorandum from Janet Reno, Attorney General, to Holders of U.S. Attorneys' Manual, Title 9 (Oct. 12, 1993), *reprinted in* 6 FED. SENT'G REP. 352, 352 (1994) (arguably relaxing the standards of the Thornburgh memo by allowing prosecutors to consider "such factors as [whether] the sentencing guideline range . . . is proportional to the seriousness of the defendant's conduct . . ."); Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors (Sept. 22, 2003) (regarding the PROTECT Act and reaffirming "Congress' intention that the Sentencing Reform Act and the Sentencing Guidelines be faithfully and consistently enforced"), http://www.crimelynx.com/ashcharge_memo.html (last visited Sept. 21, 2005); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.170(B) (2005), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/ (last visited Sept. 21, 2005).

69. That is, the prosecutorial motion requirement for a substantial assistance departure under both 18 U.S.C. § 3553(e) (2005) and U.S. SENTENCING GUIDELINES MANUAL §5K1.1 (2004). See *supra* note 60 and accompanying text.

70. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650.

71. In the interest of fair disclosure, when I first began writing about the Guidelines ten years ago, I disparaged the notion that the Guidelines system had granted prosecutors undue sentencing authority. Bowman, *Quality of Mercy*, *supra* note 46, at 732 (discussing the "bogeyman of rampant prosecutorial discretion"). Whether I have been wrong all along or whether, as I think, the last decade has seen a steady and accelerating accretion of

D. *The Alliance of Congress and the Department of Justice*

At the policy and rulemaking level, the complexity of the Guidelines system provides an incentive and a mechanism for both the Justice Department and Congress to intervene in the details of the sentencing rulemaking process.⁷² In a very simple sentencing system, even one with guidelines, there are very few ways for Congress to affect sentences directly. In such a system, Congress can respond to political stimuli by increasing statutory maximum penalties. Because few defendants ever receive the maximum possible sentence, however, such increases are primarily symbolic. Congress can pass minimum mandatory sentences, but mandatory sentences are clumsy instruments that Congress has, at least until recently, employed only sparingly and, in any case, are likely to be employed only once or twice for any given category of crime.⁷³ Similarly, if the Guidelines offense table contained only six or ten levels of offense severity rather than forty-three, Congress could only increase sentences for any category of crime so far and so often before exceeding the balance of the plainly ridiculous. But by designing a system in which offense severity can be subdivided 258 ways, the Sentencing Commission created a mechanism that permits endless legislative tinkering in response to the crime du jour.

The usual, if not invariable, political instinct of Congress is to favor ever-increasing criminal punishments. Thus, it may come as no surprise that the advent of a complex sentencing mechanism permitting repeated, targeted sentencing increases would produce a rising incidence of legislation calling for such increases. However, the behavior of Congress would not have occurred, at

prosecutorial sentencing authority is a judgment best made by others.

72. The fact that legislatures, federal and state, have sometimes seemed to be allied with prosecutors in pursuit of ever-higher sentences is not a new observation. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 537-39 (2001) (asserting that overcriminalization expands prosecutorial power and noting an alliance between legislators and prosecutors in the late twentieth century); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 108-12 (2003) (arguing that the addition of new, more specific federal narcotics crimes and changes in sentencing law shifted power to prosecutors from 1985 to 2000). However, the effect of the particular architecture of the Guidelines-centered federal sentencing system on the relation between Congress and federal prosecutors has not been fully appreciated.

73. When Congress imposes a mandatory minimum sentence the first time, that sentence is likely to be stiff, indeed so stiff that it overpunishes at least some appreciable fraction of the offenders to which it applies. See Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1044-48 (2004) (discussing defects in mandatory minimum sentences); Anthony M. Kennedy, Associate Justice, U.S. Supreme Court, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) ("By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."), at http://www.supremecourt.us.gov/publicinfo/speeches/sp_08-09-03.html (last visited Sept. 21, 2005). Where that is the case, subsequent increases in the minimum sentence become less likely.

least to the same degree, without at least the acquiescence of the Justice Department. The Justice Department has neither a vote nor a veto on congressional sentencing legislation, but Congress listens more respectfully to the Department than to any other outside voice on such matters. Therefore, the behavior and motivations of the Justice Department under the complex Guidelines system require careful analysis.

Institutionally, the Justice Department liked the pre-*Booker* Guidelines system for many reasons, most unrelated to whether longer sentences are objectively better than somewhat shorter ones in controlling crime. The combination of complexity, rigidity, and severity conferred tremendous power on prosecutors at the district level. The ability to threaten defendants with very long sentences if they do not plead guilty or, where desired, cooperate against others is a hugely powerful tool in inducing pleas and securing cooperation. Early skeptics of the Guidelines predicted that the severity and rigidity of the system would dramatically reduce the willingness of defendants to plead guilty, thus causing the number of trials to skyrocket and the system to move toward gridlock. The opposite has occurred. As the Guidelines and associated statutes have grown ever more complex, giving prosecutors ever more bargaining chips, the rate of guilty pleas has steadily increased.⁷⁴ Intertwined with the overall increase in plea rates has been the rise and increasing sophistication of the government's use of sentencing levers to induce cooperation.⁷⁵ The Guidelines have thus given the government a powerful toolbox it uses to manage an ever-rising caseload⁷⁶ and to secure cooperation in multi-defendant cases.

Despite the usefulness to prosecutors of a complex, mandatory, fact-dependent sentencing system, it is not immediately obvious why the Justice Department has continued to push for or at least acquiesce in legislation calling for higher sentences, given that federal sentences are already very stringent indeed. The best explanation probably combines three considerations. First, the Department has sometimes quite genuinely felt that certain classes of offenders

74. For example, between 1992 and 2002, the guilty-plea rate for drug-trafficking offenders jumped from 82% to 97.2%. U.S. SENTENCING COMM'N, 1995 ANNUAL REPORT 112-13; U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 73 tbl.38 (2004) [hereinafter U.S. SENTENCING COMM'N, 2002 SOURCEBOOK]. Interestingly, the guilty-plea rate for drug-trafficking offenses dropped in 2003 to 95.6%. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK, *supra* note 8, at 73 tbl.38. Whether this represents a one-time statistical hiccup or a more sustained trend remains to be seen.

75. Between 1989 and 1994, the percentage of federal defendants who were granted substantial assistance departures at the government's request increased from 3.5% to 19.5%. SUBSTANTIAL ASSISTANCE WORKING GROUP, U.S. SENTENCING COMM'N, FEDERAL COURT PRACTICES: SENTENCE REDUCTIONS BASED ON DEFENDANT'S SUBSTANTIAL ASSISTANCE TO THE GOVERNMENT (1997). This trend moved downward slightly in 2002 to 17.4%. U.S. SENTENCING COMM'N, 2002 SOURCEBOOK, *supra* note 74, at 51 fig.G.

76. The number of defendants sentenced in federal court increased from approximately 36,000 in 1988 (the first full year of Guidelines operation), U.S. SENTENCING COMM'N, 1990 ANNUAL REPORT 39 fig.2 (1991), to 70,258 in 2003, U.S. SENTENCING COMM'N, 2003 SOURCEBOOK, *supra* note 8, at fig.A.

were underpunished under existing rules.⁷⁷ Second, the Department has developed a liking for the leverage brought by being able to threaten very long sentences. To an increasing degree, the Department has come to justify its requests for tougher sentencing rules, not on the ground that offenders actually deserve the higher sentences, but simply because the threat of the higher sentence provides a greater inducement for defendant cooperation.⁷⁸ Third, in those cases where the impetus for raising sentences comes from Congress, the Department accepts the increases both in order to increase governmental leverage and because the Justice Department knows that it retains effectively unfettered discretion not to invoke the higher penalty in cases where prosecutors deem it unjust or inappropriate to do so.

E. *The Federal Budget and Federal Sentencing*

Even if one views more stringent sentencing rules and rising federal prison populations as an unalloyed social good, it is a good with a price tag like any other social program. Consequently, one might expect that competition within executive branch agencies for budgetary resources and the need for Congress to choose among competing social priorities would impose a limit on the upward movement of federal criminal sentences. Yet neither the Justice Department

77. See, e.g., Testimony of Mark E. Matthews, Deputy Assistant Attorney General, Before U.S. Sentencing Comm'n, (March 5, 1998) (advocating increases in sentences for tax offenders), at http://www.ussc.gov/agendas/3_5_98/matthews.htm (last visited Sept. 19, 2005); Testimony of Robert S. Mueller, III, Acting Deputy Attorney General, Before U.S. Sentencing Comm'n (March 19, 2001) ("Simply stated, the Department believes that sentences in white collar crime cases are often far too lenient, and need to be increased, not decreased. Accordingly, the Department strongly supports the Commission's efforts to change the law's tables to increase sentences for mid- and high-level white collar crimes."), at <http://www.ussc.gov/hearings/Pubhrng2001.htm> (last visited Sept. 19, 2005); Written Statement of James K. Robinson, Assistant Attorney General, Criminal Division, Before U.S. Sentencing Commission 4 (March 23, 2000) (urging sentence increases for economic crime offenses involving "high dollar losses"), at http://www.ussc.gov/AGENDAS/3_23_00/RobinsonDOJ.PDF (last visited Sept. 19, 2005).

78. See Sue Reisinger, *Government Seeks Tougher Sentences*, NAT'L L.J., Mar. 10, 2003, at A20 (providing statement of Drew Hruska, senior counsel to deputy attorney general, arguing for across-the-board economic crime sentence increases to provide leverage to secure cooperation). Associate Attorney General Catherine O'Neil testified:

Equally importantly, mandatory minimum sentences provide an indispensable tool for prosecutors, because they provide the strongest incentive to defendants to cooperate against the others who were involved in their criminal activity. In drug cases, where the ultimate goal is to rid society of the entire trafficking enterprise, mandatory minimum statutes are especially significant. . . . The offer of relief from a mandatory minimum sentence in exchange for truthful testimony allows the Government to move steadily and effectively up the chain of supply, using the lesser distributors to prosecute the more serious dealers and their leaders and suppliers.

Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004: Hearing on H.R. 4547 Before the Subcomm. on Crime, Terrorism, and Homeland Security, H. Comm. on the Judiciary, 108th Cong. (2004) (statement of Catherine M. O'Neil, Associate Deputy Attorney General).

(home of the Bureau of Prisons) nor Congress ever seems to count the cost of the higher sentences. This budgetary heedlessness stands in marked contrast to the behavior of the states, in which many legislatures have responded to the rising costs of mass incarceration by moderating their sentencing policies.⁷⁹ The difference between state and federal approaches can be explained by noting that state legislatures operate under two constraints Congress lacks. First, states are customarily obligated by law to balance their budgets.⁸⁰ Second, the proportion of state budgets devoted to law enforcement and corrections expenditures is far higher than the relatively insignificant proportion of the federal budget devoted to these functions.⁸¹ Accordingly, Congress can keep raising sentences almost indefinitely without ever confronting either the legal obstacles or the painful budgetary trade-offs that their state counterparts must resolve. The lack of perceived economic constraint on federal sentencing policy has led to a failure by Congress to perform, in this field at least, its constitutional role of balancing national priorities.

F. *The Sentencing Commission*

The Commission is the product of an identifiable view of both government generally and criminal sentencing more particularly. Speaking broadly, the United States Sentencing Commission is an expression of confidence in the administrative state: the idea that “experts” insulated from politics are well suited (and sometimes best suited) to make important public choices. More particularly, the Commission exists because a prominent strain of thinking in the sentencing reform movement of the late 1970s and early 1980s held that criminal sentencing was both too complex and too politically charged to be left

79. See DANIEL F. WILHELM & NICHOLAS R. TURNER, *VERA INST. OF JUSTICE, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION?* 4 (2002) (discussing how state budget shortfalls have translated into reduction of criminal penalties); JON WOOL & DON STEMEN, *VERA INST. OF JUSTICE, CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003 1-2* (2004) (same).

80. See RONALD K. SNELL, *NAT’L CONFERENCE OF STATE LEGISLATURES, STATE BALANCED BUDGET REQUIREMENT: PROVISIONS AND PRACTICE* (2004), at <http://www.ncsl.org/programs/fiscal/balbuda.htm> (last visited Sept. 20, 2005).

81. From 2002 to 2004, corrections expenditures alone, not counting the costs of the police and courts, averaged roughly seven percent of the general fund expenditures of the states. *NAT’L ASS’N OF STATE BUDGET OFFICERS, 2003 STATE EXPENDITURE REPORT* 60 tbl.34 (2004), <http://www.nasbo.org/Publications/PDFs/2003ExpendReport.pdf> (last visited Sept. 20, 2005). By contrast, in 2001, the federal government spent approximately \$25 billion on direct expenditures for criminal and civil justice, including corrections, courts, law enforcement, and civil justice costs. *BUREAU OF JUSTICE STATISTICS, EXPENDITURE AND EMPLOYMENT STATISTICS* (2005), <http://www.ojp.usdoj.gov/bjs/eande.htm> (last visited Sept. 20, 2005). In 2001, the federal budget was \$1.8 trillion, meaning that the federal expenditures for all criminal and civil justice constituted approximately 1.4% of the federal budget in that year. *OFFICE OF MGMT. & BUDGET, A CITIZEN’S GUIDE TO THE FEDERAL BUDGET: BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 2001*, at iii (2001), <http://www.gpoaccess.gov/usbudget/fy01/pdf/guide.pdf> (last visited Sept. 20, 2005).

entirely to the judgment of politicians.⁸²

The drafters of the Sentencing Reform Act intended that the United States Sentencing Commission be an expert body insulated from politics.⁸³ To insure the Commission's political and institutional neutrality, the Sentencing Reform Act situated the Commission outside both of the political branches of government and made it independent even of the normal chain of command in the judicial branch in which it formally resides.⁸⁴

Even if one believes in the administrative state and agrees that politically neutral experts are the best sentencing rulemakers, in domestic public life, as in international relations, neutrality can be a very difficult posture to maintain. As the history of twentieth-century Europe demonstrated repeatedly, an entity can only remain neutral if it is strong enough to repel aggression alone or has powerful neighbors who see maintenance of that neutrality as consistent with their own interests.⁸⁵ The problem for the Sentencing Commission has been that it lacks both power of its own and powerful institutional allies with an enduring commitment to the Commission's independence.

The Commission is not a part of the executive branch, which is good insofar as it ensures that sentencing rulemaking is not under the direct control of the administration of the day, but bad inasmuch as the Commission lacks the legitimacy and political clout of executive branch agencies whose rules carry the imprimatur of the president. The Sentencing Commission is distinct even from other "independent" agencies of the federal government. Almost unique among agencies of analogous design and function, the Sentencing Commission lacks powerful competing interest groups on both sides of the issues it is charged with deciding. For example, the Federal Trade Commission and the Securities and Exchange Commission, while independent,⁸⁶ have powerful constituencies on both sides of most issues they must resolve. By contrast, there are powerful voices perennially seeking tougher criminal sentences, but no

82. See, e.g., ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

83. See *Mistretta v. United States*, 488 U.S. 361, 379 (1989) ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.").

84. See *id.* at 393 (noting that the Sentencing Commission "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch").

85. See, e.g., GERHARD L. WEINBERG, *A WORLD AT ARMS* 73-89, 107-21, 173-74, 397-98 (1994) (describing the posture of neutral countries at the outset of World War II, the German violation of the neutrality of Belgium, Norway, and Denmark, and the position of Switzerland and Turkey throughout the war).

86. Securities Exchange Act of 1934, 15 U.S.C. § 78d (2005) (creating the Securities and Exchange Commission as an independent agency); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control and Competition*, 71 ANTITRUST L.J. 1, 59-60 (2003) (describing the creation of the Federal Trade Commission as an independent agency).

constellation of politically influential voices on the other side of the issue.⁸⁷

Nor is the Sentencing Commission in the legislative branch, a fact that was at the root of the constitutional challenge to the Commission on the grounds of impermissible delegation of legislative authority.⁸⁸ Implicit in Justice Scalia's famous crack about the Commission being a "junior-varsity Congress"⁸⁹ is the reality that it lacks important attributes of the real Congress. The Commission has been asked to perform an essentially legislative task with high political visibility, but it has neither the democratic legitimacy conferred by elections nor the power conferred by the Constitution on Congress itself vis-à-vis other institutions of the federal government. Scalia was making a constitutional argument about excessive delegation of congressional authority, but the practical problem with the Commission has proven to be not that it has too much legislative authority, but that it has too little—that the Commission is too much a creature of Congress, unable to exercise independent judgment, or at least to make such judgments stick.

Finally, though the Commission is formally within the judicial branch and has judges among its members, it lacks the signature power of the judiciary in interbranch competition: the power to rule an executive act unlawful or a congressional enactment unconstitutional. In the Commission setting, the judge-commissioners have the personal independence that comes with a lifetime appointment to the bench, but in all other respects they are indistinguishable from any other political appointee. The nonjudge sentencing commissioners lack even the protection of life tenure. Thus, the peculiar position of the Sentencing Commission in the federal government makes it an orphan, an oddity even in the judicial branch of which it is nominally a part, powerless to resist a combination of the legislative and executive branches.

In the first years after the passage of the Sentencing Reform Act, the Commission was essential to both the creation and development of the Guidelines system. But the Commission's power has waned for at least two reasons. First, and most fundamentally, although a body of experts was necessary to design a sentencing system, once the system was in place, no particular expertise was required to fiddle with it. Indeed, as noted above, the complexity of the system positively invites nonspecialist tinkering, and the Congress-Justice Department alliance has tinkered ever more avidly with each

87. In saying this, I do not denigrate the persistent toil of representatives of the criminal defense bar such as the National Association of Criminal Defense Lawyers, the American Bar Association, the National Association of Federal Defenders, and the Commission's own Practitioners' Advisory Group, or the work of advocacy groups such as Families Against Mandatory Minimums. I merely state a political reality, namely that criminal defense lawyers and other advocates for criminal defendants have relatively little political clout in comparison to the sorts of interest groups that customarily become involved in policy disputes before most other federal agencies.

88. *Mistretta*, 488 U.S. at 370.

89. *Id.* at 427 (Scalia, J., dissenting).

passing year.

Second, for all the structural reasons just noted, the Commission lacks any effective means of counteracting a determined combination of Congress and the executive branch. This problem has been exacerbated by the fact that the Commission became estranged from the judiciary, its institutional home and natural ally in interbranch competition, early in its history and has never entirely healed the breach. The estrangement began with the judiciary's initial negative reaction to the Guidelines. Many judges found the Commission and its Guidelines to be unconstitutional. And even after the Guidelines were deemed constitutional by the Supreme Court, many trial judges were initially disposed to treat them as suggestions rather than rules. The Commission found itself at odds with a judiciary hostile to its product and its mission and, as a result, for a long time saw a big part of its job as reining in judicial resistance to the Guidelines. In consequence, the Commission was for years almost an alien body within the judiciary branch. Even though the relationship has warmed as the two sides have realized their common interests in the face of the Congress-Justice Department combination, the Commission's dealings with the judiciary remain very much at arm's length.

In sum, the combination of the natural legislative disposition to increase sentences for political gain, the absence of any fiscal governor on that disposition, the Justice Department's institutional interest in the power conferred by a complex federal sentencing guidelines system, and the weakness and isolation of the Sentencing Commission has caused the system to evolve into an increasingly complicated and powerful piece of machinery whose many gears move only one way: slowly, steadily, pawl by pawl, upward.

III. SOME PRESCRIPTIONS

The situation described so far presents two interlocking problems for the would-be reformer. The first is how to design a federal sentencing system that addresses the principal defects in the system created by the Sentencing Reform Act of 1984, most particularly the institutional imbalances that have made the rulemaking process a one-way, upward ratchet. The second and far more difficult problem is figuring out how a new and substantially improved system could ever be enacted when the primary defect of the existing system is that it confers too much power on the political branches of government whose support would be necessary to enact a replacement regime.

A. *What To Do*

1. *Booker is not the answer*

The Supreme Court's decision in *United States v. Booker* has not provided a solution to the systemic defects recounted above. The problem is that the

system of advisory guidelines created by the *Booker* remedial opinion leaves virtually all of the undesirable features of the old system intact. The Guidelines and associated sentencing statutes are still too complex, still provide multiple levers for prosecutorial control of sentencing outcomes, and still provide the same incentives and mechanisms for congressional micromanagement. The only difference between pre- and post-*Booker* Guidelines is that judges now have some as-yet-undefined amount of additional discretion to vary from the Guidelines, and the government has experienced a very modest (and probably short-lived) reduction in control over sentencing outcomes.⁹⁰ Should the *Booker* system survive, the exercise of the added judicial discretion might secure better outcomes for some defendants, but it would also inevitably create more interjudge and interdistrict disparity.⁹¹

Judges, the defense bar, and some academic observers seem to be mesmerized by *Booker*, perhaps because they view the system it imposed as both incrementally better than the system it overthrew and markedly better than any system the current Congress would be likely to invent. While I am sympathetic to these sentiments, I think the *Booker* system is politically unsustainable over the long term. Indeed, the long term may prove quite short now that the Attorney General has expressed his dissatisfaction with post-*Booker* advisory Guidelines and provisionally endorsed a proposal to inoculate the Guidelines against Sixth Amendment defects by making the minimum of Guidelines ranges enforceable as they were before *Blakely* and *Booker* while removing or rendering advisory the maximums of the Guidelines ranges.⁹² This

90. One point about the post-*Booker* regime that has caused the Justice Department particular concern is the de facto repeal of the government's monopoly on substantial assistance motions. See Alberto Gonzales, U.S. Attorney General, Sentencing Guidelines Speech (June 21, 2005) [hereinafter Gonzales Speech], at <http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm> (last visited Sept. 20, 2005); Statement of Christopher Wray, Assistant Attorney General, The Future of Sentencing, Testimony Before the U.S. Sentencing Comm'n (Nov. 17, 1004), at http://www.ussc.gov/hearings/11_16_04/Wray-testimony.pdf (last visited Sept. 21, 2005). However, it is quite clear that, even if the Department were to refrain from seeking legislation aimed at a thoroughgoing "*Booker* fix," it will surely seek and obtain legislation reinstating the substantial assistance motion monopoly. See, e.g., Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. (2005).

91. Over time, as Congress and the Justice Department continued to nudge up the Guidelines sentences for crimes and judges grew increasingly confident in their power to adjust sentences in individual cases, the gap between the sentences the law declared to be presumptively correct and the sentences actually imposed would widen, at least for defendants sentenced by assertive judges or in circuits hospitable to a robust exercise of judicial discretion.

92. See Gonzales Speech, *supra* note 90. The approach discussed by Attorney General Gonzales was first publicly advanced in a memorandum I wrote to the United States Sentencing Commission in June 2004 as an interim solution to the crisis created by *Blakely*. *Blakely v. Washington and the Future of the Federal Sentencing Guidelines: Hearing Before the S. Comm. on the Judiciary*, 108th Cong (July 13, 2004) (testimony of Frank O. Bowman, III); see also *Defending America's Most Vulnerable: Safe Access to Drug*

approach would restore the pre-*Booker* Guidelines system almost exactly as it was before. Thus, the two questions posed at the beginning of this Part—what should a new system look like and how can a desirable system be enacted when the current Guidelines system is so favorable to Congress and the Justice Department—remain to be answered.

2. *The virtues of simplicity*

A detailed description of a new and improved federal sentencing system is beyond the scope of this Article, but the outlines can be sketched succinctly. First, sentencing guidelines are, in principle, still a good idea. As the Sentencing Initiative of the bipartisan Constitution Project recently concluded, “Sentencing guidelines are best capable of controlling unwarranted disparities while retaining appropriate flexibility [and they] enhance public confidence in the sentencing system by being open about the factors upon which sentences are being based.”⁹³ Second, federal sentences should be somewhat less stringent than they now are, at least for some crimes and classes of offenders. At an absolute minimum, the rulemaking system must be made hospitable to downward as well as upward adjustments of sentencing levels. Third, a revised federal sentencing system must be compliant with the letter of the Supreme Court’s developing Sixth Amendment jurisprudence and should be consistent with the spirit of that jurisprudence by providing an appropriate role for juries in finding facts important to sentencing. Fourth, a revised federal sentencing system should distribute the power to make and apply sentencing rules among institutional sentencing actors more sensibly than the current system does. Finally, the combination of excessive complexity and rigidity is the besetting sin of the current system; therefore, proper institutional balance cannot be achieved without a marked simplification of federal sentencing rules and

Treatment and Child Protection Act of 2004: Hearing on H.R. 4547 Before the Subcomm. on Crime, Terrorism, and Homeland Security, H. Comm. on the Judiciary, 108th Cong. (July 6, 2004) (testimony of Frank O. Bowman, III, suggesting “topless” guidelines as an interim measure); Frank O. Bowman, III, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 FED. SENT’G REP. 364 (2004). I do not, however, support it as a long-term alternative. See *Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, H. Comm. on the Judiciary*, 109th Cong. (Feb. 10, 2005) (testimony of Frank O. Bowman, III) (emphasizing that “topless” guidelines are not an appropriate long-term response to *Booker*).

93. CONSTITUTION PROJECT, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS (2005), <http://www.constitutionproject.org/si/Principles.doc> (last visited Aug. 28, 2005). In the wake of the Supreme Court’s decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), the Constitution Project launched a Sentencing Initiative, which brought together a committee of sentencing experts to study federal sentencing and propose improvements to the system co-chaired by former Attorney General Edwin Meese and former Deputy Attorney General Phillip Heymann. I serve as co-reporter to the Sentencing Initiative.

structures.

To accomplish the foregoing ends, I have elsewhere proposed a simplified guidelines system.⁹⁴ This system would center on a simplified sentencing table consisting of nine base sentencing levels, eight of which would be subdivided into three sub-ranges. Placement in the base sentencing range would result from a combination of offense facts (either found by a jury or admitted in a plea) with the defendant's criminal history. Placement in the sub-ranges would result from post-conviction judicial findings of sentencing factors. No upward departures from the base sentencing range would be permissible, but defendants might be sentenced below the low end of the base sentencing range as a result of an acceptance of responsibility credit or a downward departure motion. Both the government and the defendant would retain rights of appeal of post-conviction judicial findings of fact and of misapplications of the law.

The merits or demerits of this particular plan are unimportant to the present discussion. The key for present purposes is that any successful reform must markedly simplify the federal sentencing process and restore institutional balance among the principal sentencing actors.

B. The Conditions Necessary for Success

In a nutshell, the political problem for serious federal sentencing reform is this: the federal sentencing regime built around the Sentencing Guidelines in both its pre- and post-*Booker* forms is substantively undesirable, but immensely attractive to both Congress and the Justice Department. Under current Supreme Court precedent, both the post-*Booker* system of presumptive/advisory Guidelines and the Justice Department's preferred modification of making the minimum Guidelines ranges mandatory are constitutionally acceptable. Therefore, so long as Congress and the Justice Department remain allied in support of some variant of the existing complex system, nothing important will change. Consequently, a necessary precondition of meaningful reform is to convince at least one (and preferably both) of these institutions that a substantively better system would serve not only the public good, but also its institutional interests.

No one should pretend that this political problem can be easily solved. The solution requires the confluence of a number of nascent trends and perhaps improbable events, as described in the following Parts.

1. Contributions from the Supreme Court

Beneficial change will require further developments in the Supreme Court's Sixth Amendment jurisprudence. I think it exceedingly unlikely that

94. See Bowman, *Beyond BandAids*, *supra* note 5.

the Justice Department will ever abandon its support of the Guidelines system so long as the advantages this system confers on prosecutors continue to outweigh the burdens. From the government's point of view, a signal advantage of the original Guidelines system was that it cabined judicial discretion at a very low procedural cost—the facts generating Guidelines ranges were either stipulated to or adjudicated by judges in hearings characterized by a preponderance of the evidence standard, little or no formal discovery, and relaxed evidentiary rules. In the period between *Blakely* and *Booker*, the Justice Department confronted the possibility that all Guidelines-related facts would have to be pled in indictments and, if contested, proven beyond a reasonable doubt to juries.⁹⁵ Although opinion was not uniform throughout the Department, the majority view (which was reflected in the government's arguments before the Court in *Booker*⁹⁶) was that trying to administer the Guidelines as they existed through a regime of jury trials would be, if not impossible, then at the least extraordinarily burdensome.

In her dissent in *Blakely v. Washington*, Justice O'Connor astutely characterized the requirement of a jury trial for facts increasing maximum sentencing exposure as a "constitutional tax" on the development of structured-sentencing systems.⁹⁷ In other words, the *Blakely* decision allowed states and the federal government to continue to utilize complex, fact-based sentencing rules to cabin judicial sentencing discretion, but required the government to bear the procedural burden of a full-blown jury trial on facts legally necessary to increase maximum sentences. *Booker*'s reconfiguration of the Sentencing Guidelines into an "essentially advisory" system has allowed the government to evade *Blakely*'s constitutional tax, at least for the moment, because judges can constitutionally find facts to trigger specified Guidelines ranges so long as the maximums are advisory rather than mandatory.

So long as *Booker* itself remains good law and so long as the Justice Department and Congress are content with advisory Guidelines, the idea of a constitutional tax will remain unimportant. However, both Congress and the Justice Department have expressed growing discomfort with treating the

95. Memorandum from James Comey, Deputy Attorney General, to All Federal Prosecutors, Regarding "Departmental Legal Positions and Policies in Light of *Blakely v. Washington*" 3-4 (July 2, 2004), http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf (last visited Sept. 20, 2005); Memorandum from Christopher A. Wray, Assistant Attorney General, to All Federal Prosecutors (2004) (offering guidance for pending cases in applying the holding of *Blakely v. Washington*), http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf (last visited Sept. 20, 2005).

96. Brief for the United States at 43-59, *Booker v. United States*, 125 S. Ct. 738 (2005) (Nos. 04-104 & 04-105) (arguing that the process of judicial finding of sentencing facts is not severable from the Guidelines rules, in part on the ground that jury fact-finding would be both cumbersome and inconsistent with the evident intention of Congress and the Sentencing Commission).

97. *Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting).

Guidelines as advisory, and both have expressed enthusiasm for proposals that would make the minimums legally enforceable while leaving the maximums advisory.⁹⁸ These proposals take advantage of the Supreme Court's decision in *Harris v. United States*⁹⁹ that judges may constitutionally find facts that result in minimum sentences.

As more than one observer has remarked, *Harris* is logically inconsistent with *Apprendi*, *Blakely*, and *Booker*.¹⁰⁰ Why, after all, should the Sixth Amendment require a jury trial on facts that increase a defendant's theoretical maximum sentencing exposure but not on facts that increase the minimum sentence he must receive by law? If the Supreme Court were to overturn *Harris* and require jury trials for facts generating hard, enforceable minimum sentences, such a decision would have important effects beyond the rationalization of a corner of Sixth Amendment doctrine. Most immediately, such a decision would foreclose the Justice Department's preferred legislative option of reenacting the Guidelines in a form that would allow judicial findings of fact to generate sentencing ranges with enforceable minimums and advisory maximums.

With the option of "soft-top" guidelines foreclosed by a reversal of *Harris*, the only two forms in which the current, complex Guidelines could be preserved would be the post-*Booker* advisory system or something like the House Judiciary Committee's proposal to turn the Sentencing Guidelines into a system of mandatory minimum sentences.¹⁰¹ Neither option is likely to seem attractive to the Justice Department. The Department has already expressed its distaste for advisory guidelines. Transforming the Guidelines into a system of mandatory minimum sentences would impose O'Connor's "constitutional tax" in its most onerous form, requiring pleading and proof to a jury of all contested Guidelines-related facts. While some members of Congress might persist in their enthusiasm for administering the current Guidelines through jury findings of fact, it seems likely that reversal of *Harris* would split the Congress-Justice Department alliance and send the Department in search of a sentencing model that would cabin judicial discretion and preserve what it views as an essential degree of plea-bargaining leverage, but do so at a tolerable procedural cost.

The reversal of *Harris* by itself might not compel the Justice Department to consider a materially different successor to the present complex system. For example, the Department might conclude that its best option after the fall of *Harris* would be acceptance of the basic post-*Booker* advisory Guidelines

98. H.R. 1528, 109th Cong., § 12 (2005); Gonzales Speech, *supra* note 90.

99. 536 U.S. 545 (2002).

100. See, e.g., Bowman, *Beyond BandAids*, *supra* note 5, at 53-54; Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395, 414-29 (2005); see also Margareth Etienne, *Into the Briar Patch? Power Shifts Between Prosecution and Defense After United States v. Booker*, 39 VAL. U. L. REV. 741, 745-49 (2005).

101. H.R. 1528, § 12.

framework shored up by some patchwork legislation designed to restore prosecutorial authority.¹⁰² This conclusion might be rendered less likely, however, by further developments in the Supreme Court's Sixth Amendment jurisprudence.

Whatever one may think of its practical consequences, the opinion of the remedial majority in *Booker* is doctrinally peculiar. *Blakely* and the *Booker* merits majority say that a judge may not find facts that increase a defendant's presumptive maximum sentence. Yet the *Booker* remedial opinion judicially amends the Sentencing Reform Act to create an "advisory" system in which judges find facts that generate Guidelines ranges which prove, based on post-*Booker* case law, to have something very much like presumptive effect.¹⁰³ At a minimum, *Booker* leaves very unclear the boundary between those facts that must be found by juries and those that can be found by judges. Implicit in the *Booker* remedial holding is the idea that facts found by judges can constrain judicial sentencing discretion only so much before these facts must be delivered to the province of the jury. The unanswered question is *how much* a factual finding can constrain judicial sentencing discretion without triggering the jury trial right.

If the Supreme Court answers this question by holding that judges must have a substantial degree of discretion to deviate from sentencing boundaries generated by judge-found facts, this holding would have three important consequences for the federal sentencing debate. First, in the near term, both Congress and the Justice Department would be more likely to find the post-*Booker* advisory regime unsatisfactory because it would require substantial judicial leeway for departures from the Guidelines. Second, if the Justice Department wanted greater certainty in sentencing, it would be driven to alternatives that rely more heavily on jury fact-finding. At the same time, the constitutional tax imposed by jury fact-finding would generate pressure for a simpler system that minimizes the number of facts that would have to be pled and proven at trial. Third, a new system with relatively few hard limits set by

102. See, e.g., *supra* note 90 and accompanying text (presenting proposals to restore the government's monopoly on substantial assistance departure motions).

103. The *Booker* remedies opinion left undisturbed 18 U.S.C. § 3553(a) (2005), which lists the factors a judge must consider in imposing a sentence and includes on that list the type and length of sentence called for by the Guidelines. Thus, appellate review of the "reasonableness" of a sentence necessarily includes consideration whether a sentence conforms to the Guidelines. The weight that should be accorded to the Guidelines sentence as compared to other § 3553(a) factors remains unresolved. Some courts have held that the Guidelines should be accorded "heavy weight." See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005), *reaff'd by*, 355 F. Supp. 2d 1269 (D. Utah 2005). Other courts have said only that sentencing judges must "consider" the Guidelines together with other factors listed in § 3553(a). See, e.g., *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005). Although the Supreme Court has not yet determined the question, I read *Booker* and subsequent lower court opinions to confer something like a presumption of reasonableness on a sentence within the applicable Guidelines range. See Bowman, *Beyond BandAids*, *supra* note 5, at 30-32 (exploring this point at greater length).

jury fact-finding might incorporate additional guidelines generated by judicial fact-finding, but the requirement of significant judicial discretion to deviate from the Guidelines boundaries would help ensure relative flexibility in a new system.

2. Contributions from the Sentencing Commission

A well-developed alternative sentencing model incorporating principles of simplicity and flexibility and aimed at achieving institutional balance is unlikely to emerge from either Congress or the Justice Department. Congress lacks the expertise to create such a system. The Justice Department might be persuaded to endorse it, but would be unlikely to offer anything that was not markedly, if perhaps understandably, tilted in favor of its own parochial interests. The proper source for such a plan is the Sentencing Commission.

So far, the Commission has been notably reluctant to advance any proposal addressing the problems created by *Booker*. The Commission feels itself under assault from every quarter, and this sense of isolation and vulnerability may have made it reluctant to do anything at all. Moreover, the Commission has a huge institutional investment in the current Guidelines—an investment which one suspects makes dramatic alteration of the status quo hard to accept. Nonetheless, significant sentencing reform at this juncture probably cannot happen unless the Commission, at the very least, espouses the need for change and ideally takes a leading role in formulating and promoting a new system.

First, the Commission must be convinced that the complexity and rigidity of the structure it created have led to the dominance of sentencing policy by the Justice Department and Congress and concomitantly to the Commission's own increasing marginalization. If the Commission recognizes that a simpler and more flexible system would not only be substantively better than the existing Guidelines, but would also in the long run help restore the influence and stature of the Commission itself by reducing the incentives and occasions for external micromanagement, that recognition could spur the Commission to creative action. Second, the judiciary and the Commission should become more closely aligned. The judges should seek more input into and influence with the Commission, and the Commission should recognize that its founding vision of neutral independence from the winds of politics was an unsustainable illusion. Its formal home and natural ally is the judicial branch, and that alliance should be fostered to the mutual benefit of both parties.¹⁰⁴

104. The task of fostering an alliance between the Sentencing Commission and the institutional judiciary may be made more difficult if the executive uses the leeway granted by the Feeney Amendment to reduce the number of judge-commissioners (or even to eliminate judges from the Commission altogether). See *supra* note 9 and accompanying text. However, I suspect that the Commission's tradition and the historical association of judges with sentencing will ensure that judges continue to be appointed to the Commission.

3. *Hopeful auguries of change in the country's mood*

The developments outlined above might produce a movement toward a simpler, less rigid federal sentencing system. However, because simplification and relaxation would almost surely involve at least a modest reduction in the severity of federal sentences, the transformation probably cannot be accomplished without a shift in the perception that longer, tougher, nastier sentences are always a political good. On the one hand, it seems hard to imagine that the fever for more punishment would ever abate. On the other hand, there are indications that a coalition of somewhat unlikely allies may be slowly generating a consensus that tough, effective law enforcement is not inconsistent with a more parsimonious employment of prison sentences.¹⁰⁵ This nascent alliance of liberal social action groups concerned about over-incarceration of the downtrodden, libertarian advocacy groups concerned about the over-criminalization of assertedly private behavior, corporate interest groups concerned about over-criminalization and over-punishment of business activity, political conservatives keen to preserve values of federalism against the perceived over-federalization of essentially local crime, fiscal conservatives worried about the cost of rising prison populations, judges protective of the prerogatives of the bench, the defense bar concerned for its clients, and perhaps even religious activists moved by the biblical imperative that justice be tempered with mercy may never coalesce as a unified movement. But concern is rising in enough different quarters that a shift in the political landscape seems at least possible. This shift is unlikely to become a national cry that every cell door should be flung open. It may, however, allow legislators to believe they have the electoral permission of their constituents to be reasonable in their approach to crime and sentencing policy.

CONCLUSION

James Madison found his way into this Article, not because I have any idea what he would have thought about the present state of federal sentencing, but because of his labors to embed two related notions into American political thinking. First, Madison believed that governments cannot rely on the persistence of disinterested virtue among any class of officials within government or class of persons outside of government. Second, because Madison understood that error, faction, and political self-aggrandizement are inevitable, he helped to design political structures and align political institutions in ways that would minimize the ill effects of these human frailties. Madison's genius lay in creating a system of institutional checks and balances that, when it works, does not merely checkmate negative impulses but also

105. See Bowman, *Murder, Meth, Mammon, and Moral Values*, *supra* note 7, at 509-15.

harnesses the energies of political competitors to produce outcomes both broadly acceptable and substantively better than any one institution or interest would be likely to produce on its own.

The federal sentencing system is in trouble because the architects of the Sentencing Reform Act and the Federal Sentencing Guidelines ignored both of Madison's fundamental insights. The drafters of the Sentencing Reform Act created a system whose long-term health depended on the enduring wisdom of a commission of nonpolitical experts possessing no independent political authority, coupled with a permanent abstention from self-aggrandizing behavior by the political branches. And the designers of the Guidelines compounded the problem by creating a system which, through its rigidity and complexity, facilitated not only repeated intervention in the sentencing process by the political branches, but also an unhealthy alliance between a Congress enamored with the electoral benefits of ever more stringent sentencing rules and a Justice Department equally enamored with the power that manipulation of such rules provides.

Therefore, a Madisonian reformer confronting the federal time machine faces a conundrum. The current federal system owes its substantive flaws in large measure to domination of the rulemaking process by the Congress-Justice Department alliance. At the same time, the system is deeply entrenched precisely because the alliance is politically advantageous to both partners. The reformer would like to reconstruct the system to create a healthier balance of institutional power, but the reconstruction cannot proceed unless the political situation can be altered by splitting the Congress-Justice Department alliance favoring the status quo. I am, at best, guardedly optimistic that the preconditions for such a split will arise anytime soon. Even if public attitudes on sentencing are evolving and even if the Sentencing Commission devotes its considerable talent to devising a better sentencing system, without an alteration of the constitutional playing field, significant reform seems improbable. Thus, the Supreme Court is the key player. By overturning *Harris* and by giving judicial sentencing discretion constitutional stature, the Court might succeed in imposing so high a constitutional tax on the sentencing status quo that real reform would at last seem desirable to the Justice Department and thus, in due course, to Congress itself. One can at least hope that the Court's future constitutional sentencing decisions will be informed by a sophisticated appreciation of the need for a balance of sentencing authority between judges, legislatures, and the executive.

